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# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 381

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

AMERICAN SURETY COMPANY, A CORPORATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (R. 104–107) overruling a motion to strike that portion of the complaint claiming liquidated damages for delay in the completion of the contract (R. 27; cf. R. 8, par. XI) is reported in 39 F. Supp. 819. The final opinion of the District Court, dealing also principally with the question of liquidated damages (R. 100–102), is reported in 44 F. Supp. 871. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 94–98) is reported in 136 F. (2d) 437.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 24, 1943 (R. 98). The petition for writ of certiorari was filed on September 24, 1943, and was granted November 8, 1943 (R. 108). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether, under the provisions of Section 21 of the Act of June 6, 1902, paragraph 5 of the specifications, expressly made a part of the contract here involved, and Article 9 of that contract (a standard form of Government construction contract), the United States, where it allowed the contractor to proceed after the stipulated date for the completion of a public building, may recover from the contractor or his surety liquidated damages for delay, embracing the period between the agreed completion date and the date upon which the United States subsequently terminated the contractor's right to proceed with the work on account of his continuing default.

## STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the Act of June 6, 1902, c. 1036, 32 Stat. 310, 326 (40 U. S. C. 269) and of the Government construction contract here involved are set forth in the Appendix, *infra* pp. 32–33.

STATEMENT

On June 24, 1931, the United States, acting through the Treasury Department, and one John V. Grogan entered into a contract requiring the latter to construct certain public buildings at the United States Inspection Station, Babb-Piegan, Montana (R. 9–22, 77). Respondent, American Surety Company, became the surety on Grogan's bond to the United States, conditioned upon his faithful performance of the contract (R. 24–26, 77–78). The United States gave Grogan notice to proceed on July 8, 1931 (R. 78), thereby fixing March 4, 1932, as the completion date pursuant to Article 1 of the contract (R. 10). The United States, at Grogan's request and with the consent of respondent, extended the time for completion of the contract to June 20, 1933, for causes considered to be excusable under Article 9 of the contract (R. 78; see also R. 16). Grogan failed to complete the work by the extended date, but the Government allowed him to continue with the construction. On July 20, 1934, thirteen months later, the work still had not been completed, and the United States, pursuant to its authority under Article 9 of the contract, terminated the contractor's right to proceed with the work because of his continuing default (R. 78–79). At respondent's request, a contract for the completion of the work, after advertising, was let by the United States to the lowest responsible

bidder (R. 79). The United States, as the result of the contractor's non-completion of the building, expended $2,044.04 more than it would have been required to expend had Grogan completed the work (R. 79–80).

The United States brought suit against Grogan and respondent in the district court to recover such excess cost and also to recover liquidated damages of $9,875 for the delay occasioned by the contractor's default (R. 1–26). The latter item grew out of Article 9 of the contract (Appendix pp. 32–33) and paragraph 5 of the specifications, attached to and made a part of the contract, paragraph 5 stipulating for payment by the contractor to the Government of $25 "as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8, 10, 16, 78). The liquidated damages were computed for the 395 days between June 20, 1933, the extended date for completion, and July 20, 1934, when the contract right to proceed was terminated (R. 8, 80).

Grogan was not served and never appeared (R. 100). The district court denied respondent's motion to strike from the complaint the paragraph which alleged a right to liquidated damages (R. 27–29, 104–107, 39 F. Supp. 819; see also R. 100–102, 44 F. Supp. 871), and after a trial without a jury rendered judgment for the United States for $2,044.04 as excess cost of completion and $9,875 as liquidated damages for delay (R. 76–84).

On appeal, the circuit court of appeals, acting by two judges,[1] affirmed the judgment as to the excess cost but reversed as to the liquidated damages (R. 94–98).

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that Article 9 of the standard form of Government construction contract did not confer upon the United States the right to recover any liquidated damages where the Government terminated the contractor's right to proceed after the completion date fixed in the contract but prior to actual completion.

2. In failing to hold that Section 21 of the Act of June 6, 1902, and the long-established administrative practice of the Government under Article 9 of the standard form of Government construction contract, required that Article 9 be construed to entitle the United States to liquidated damages accruing between the contract completion date and the date of termination of the contractor's right to proceed.

3. In failing to hold that irrespective of Article 9 of the contract, the United States was entitled to recover liquidated damages in the amount of $9,875 by virtue of Section 21 of the Act of June 6, 1902, and paragraph 5 of the specifications.

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[1] Circuit Judge Haney, who was present at the argument, did not participate in the decision (R. 94, 98).

4. In reversing the judgment of the district court in respect of the award of liquidated damages.

## SUMMARY OF ARGUMENT

I. Damages caused by the failure of a construction contractor to complete a building within the time agreed are not usually demonstrable in terms of dollars and cents, and liquidated damages are a familiar means of compensating for such delay. Recognizing that fact, Section 21 of the Act of June 6, 1902, requires that all contracts for the construction of any public building under the control of the Treasury Department shall contain a stipulation calling for liquidated damages for delay in completion. Pursuant to this statutory command, paragraph 5 of the specifications, specifically made a part of the contract in the instant case, and Article 9 of that contract provided for such liquidated damages.

The statute makes the stipulations for liquidated damages conclusive and binding upon the parties and renders proof of actual damage unnecessary. These considerations the Circuit Court of Appeals disregarded in ruling that, under Article 9, the Government is not entitled to liquidated damages for delay where it permits the contractor to attempt a tardy completion of construction but thereafter terminates the contractor's right to proceed before final completion because of his continuing default.

Paragraph 5 of the specifications, expressly made a part of the contract, categorically requires, in response to the Congressional mandate, that the contractor pay a stipulated amount as "fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract." It should, of course, be read with Article 9, and being a provision indigenous to the particular contract here involved, it may well be dispositive as against the more general language of Article 9, a general standard form contract provision. But it is unnecessary to rest upon this ground since Article 9 was likewise undoubtedly intended to be responsive to the Congressional directive and may properly, we believe, be so construed as to accord with the legislative objective.

II. While Article 9 provides for the payment of liquidated damages "*if* the Government does not terminate the right of the contractor to proceed," it is not necessary to interpret this as though it read "if the Government *never* terminates" the contractor's right to proceed. A permissible construction, and one more harmonious with the statutory intent, is to construe "if" as establishing a continuing condition with substantially the same meaning as "so long as." So read, Article 9 would require the payment of liquidated damages for every day of delay until the Government terminates the contractor's right to proceed, thus preventing the forfeiture of liquidated damages already ac-

crued. This interpretation is consistent with the well established administrative application of Article 9 by the General Accounting Office.

The construction adopted by the Circuit Court of Appeals would place the Government at the mercy of the contractor, who may avoid substantial liquidated damages simply by refusing further performance, thereby provoking termination. This gives the contractor an election as to the damages he may be required to pay which the contract does not contemplate. The liquidated damage provision, far from being a stimulant of performance, as it was intended to be, becomes a deterrent in just those instances where the delay has been the most vexatious and the accrued liquidated damages most substantial.

The remedies provided by Article 9 cannot be considered exclusive of each other. Where someone other than the original defaulting contractor completes, both the excess cost of such completion and liquidated damages for the delay are necessary, if the Government is to be fully compensated for the contractor's default.

Even if resort to implication is necessary, Article 9 should be construed so as to realize the statutory policy which it was designed to implement. And the construction for which we contend, while sustainable, we believe, under Article 9 considered alone, becomes compelling when it is considered with paragraph 5 of the specifications and with Section 21 of the 1902 Act.

## ARGUMENT

### INTRODUCTION

Section 21 of the Act of June 6, 1902 (Appendix, p. 32,) provides that "In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay." In compliance with this statutory command, the contract here involved, which called for the construction of public buildings under the control of the Treasury Department, contained stipulations for liquidated damages for delay in paragraph 5 of the specifications, and in Article 9 of the contract (see Appendix, pp. 32–33).

Section 21 of the 1902 Act makes explicit provision for the effect to be given to such a stipulation. It states that "in all suits * * *, on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." (Appendix, p. 32.) Nevertheless, the Circuit Court of Appeals held that the United States was not entitled to the stipulated damages for the contractor's delay in completing the work but could recover only "such

actual damages for the delay as it might be able to prove" (R. 96).[3]

This result the court felt was required by the wording of Article 9 of the contract, which it thought permitted the recovery of liquidated damages only "where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance (R. 96)."

While Article 9, if rigidly construed, may be susceptible of that construction, we believe it properly is to be read to authorize liquidated damages wherever the Government permits the contractor to proceed beyond the stipulated completion date but thereafter terminates his right to proceed, because of continuing default, before actual completion. The latter construction, we submit, would best serve the statutory purpose underlying Article 9; narrower interpretation would permit frustration of the Congressional purpose by inartistic drafting of a contractual provision intended to comply with an unequivocal statutory mandate.

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[3] The Government did not in the trial court assert or make any effort to establish actual damages for the delay, relying on the liquidated damage provisions of the contract, and the district court sustained this reliance. Presumably the reversal in the Circuit Court of Appeals as to liquidated damages was not intended to bar the Government upon the remand of the case pursuant to its judgment from asserting and establishing a claim for actual damages for delay if it possesses proof.

Article 9 should also be read in conjunction with paragraph 5 of the specifications, forming likewise a part of and framed particularly for the contract here involved, which specifically required that the contractor pay a specified sum as liquidated damages for each day's delay in the completion of his contract.

## I

### The Provisions of the Contract as a Whole, Read in the Light of the 1902 Act, Should Be Construed so as to Require the Contractor To Pay Liquidated Damages for Each Day He Delays Completion of His Contract

It is a familiar fact that the damages to an owner caused by failure of a construction contractor to complete a building within the time agreed, are often not demonstrable in terms of dollars and cents, primarily because there is usually no opportunity to test by experience the actual occupation or rental value of the structure or improvement being erected.[3] Consequently, a stipulation for liquidated damages as the agreed measure of the compensation payable for delay almost invariably appears in construction contracts, and has been judicially enforced, as compensatory and not as a penalty, at least since the

[3] This is particularly true, of course, in the case of a public structure.

turn of the century.[4] Section 21 of the Act of June 6, 1902, requiring that such a stipulation be included in all Government contracts for the construction or repair of public buildings and public works under the control of the Treasury Department, precludes any possibility of treating the damages as a penalty. The enactment was for the avowed purpose of providing a ready means of promoting prompt performance, and of compensating for "the inconvenience to the public and the Government in being deprived of the use of the public building"—an element of damage ordinarily impossible to prove in monetary terms. And, since "the moving consideration for the acceptance of a particular bid" may often be "the time within which the bidder agrees to complete the work," so that "the Government buys time," Congress considered it not unfair to require the contractor to pay not only "the actual damages sustained by the United States" but also an additional liquidated amount for the Government's loss of the contemplated use of the public building. H. Rep. No. 1794 (57th Cong., 1st sess.), p. 8; 35 Cong. Rec. 4835; 3 Comp. Dec. 282. As a clear statutory mandate, this statute enters into and

[4] *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 669; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119; *Hathaway & Co.* v. *United States*, 249 U. S. 460, 464; *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 225–226.

forms a part of all construction contracts under the control of the Treasury Department. *Robinson* v. *United States*, 57 C. Cls. 7, 22, affirmed, 261 U. S. 486; 4 Comp. Gen. 306, 308; cf. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Antoni* v. *Greenhow*, 107 U. S. 769, 774; *Northern Pac. Ry.* v. *Wall*, 241 U. S. 87, 91–92, *Russell Co.* v. *United States*, 261 U. S. 514, 524.

It is, however, unnecessary to discuss here the effect of the statute upon a Government contract from which the directed stipulation for liquidated damages is missing, since in the instant contract such a stipulation appears twice: in paragraph 5 of the specifications to the contract, expressly made a part of the contract (R. 8, 10, 31), and again in Article 9 of the contract. As "an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform,"[2] these provisions were designed and intended to fulfill the obligation imposed by the 1902 Act (cf. 4 Comp. Gen. 306, 308). They should be construed accordingly.

The Circuit Court of Appeals rested its decision solely upon a construction of Article 9 of the contract. It did not advert to paragraph 5 of the specifications. The latter, however, is equally

[2] See *Robinson* v. *United States*, 261 U. S. 486, 488; cf. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

a part of the contract, was specifically set out in the Government's complaint in a separate paragraph (XI) as the basis of its claim for liquidated damages (R. 8), and was treated as vital by respondent through the interposition of a motion to strike Paragraph XI (R. 27) which was extensively argued by it and became the subject of a written opinion by the trial court (R. 104–107). Paragraph 5 of the specifications (R. 8) is a provision which was fashioned for the particular contract here involved and not a standard form provision prescribed for general use, like Article 9, the standard liquidated damage provision. Paragraph 5 specifically provides that "The contractor shall pay to the government the amount of Twenty-five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract" (R. 8). This categorical requirement for liquidated damages patently was sufficient to cover the situation of a contractor who, like respondent's principal, essayed to carry the work to a tardy completion, but was unable to finish the job with reasonable promptness, a situation which the Circuit Court of Appeals recognized as one which "might well have been, but was not," in its opinion, covered by Article 9 (R. 96). That article certainly must be read in conjunction with paragraph 5 of the specifications; indeed, the latter provision, drafted particularly for the instant

contract, may well control over the more general language of the standard form provision. However, we do not think it necessary to rest our case on this ground alone, for we believe that Article 9, considered in the light of the purpose of the 1902 Act, to which it was intended to be responsive, should properly be construed to carry out the Congressional objective.

## II

### Article 9 of the Contract Authorizes Recovery of Liquidated Damages for Delay Even Where the Work is Completed by Someone Other Than the Contractor

Article 9 of the contract provides that if the contractor refuses or fails to prosecute the work with proper diligence or to complete it within the contract time, the Government may terminate the contractor's right to proceed, prosecute the work to completion, and recover from the contractor and his sureties any excess cost occasioned the Government thereby. But it also provides that "If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is com-

pleted or accepted the amount as set forth in the specifications * * *."

The contractor in this case did not abandon construction nor did the Government terminate his right to proceed with the work on or before the stipulated completion date. Instead, the contractor, with the Government's permission, essayed to complete the construction, and it is not denied that the Government was justified in terminating his right to proceed when some thirteen months later he had still not finished the work.

But the Circuit Court of Appeals read Article 9 as affording the Government liquidated damages only where it allows the contractor to continue to completion, no matter how long completion may be delayed. In that court's view, if the Government at any time after the agreed completion date terminates the contractor's right to proceed, however justifiedly, liquidated damages may not be recovered. In short, the court read Article 9 as though it provides for liquidated damages only "if the Government *never* terminates" the contractor's right to proceed. As a matter of semantics, this construction is certainly no more compelling than to read the phrase "*if* the Government does not terminate" the contractor's right to proceed, as establishing a continuing condition, under which liquidated damages will accrue "*so long as* the Government does not terminate" it. *Campou* v. *Chene,* 1

Mich. 400, 413 (1850). Thus if a will provided that an estate pay $100 a month to W if she does not marry, the normal understanding would be that W would receive the amount stated for as long as she did not marry, and that if she married she would not be obligated to repay the amounts received beforehand.

As the diversity of judicial opinion in this and prior litigation (*Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 256, 257) makes manifest, the liquidated damage provision of Article 9 is ambiguous in so far as it bears on the present question. Hence, that interpretation must be preferred which will best serve the policy of the underlying statute. Cf. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 205.[6] It is only by interpreting Article 9 as sanctioning the recovery of accrued liquidated damages up to the date of termination that the prime purpose of the 1902 Act is fully effectuated—the elimination of the uncertainties and difficulties of establishing the actual damages caused to the Government by delay in obtaining the use of a public building.[7] This situation the Circuit Court of Appeals recognized, but thought itself powerless to meet by reason of the wording of Article 9 (R. 96).

No barrier is opposed to such interpretation by the language requiring payment of liquidated

[6] The statute enters into and forms part of the contract. See p. 12–13, *supra*.

[7] Cf. *Wise* v. *United States*, 249 U. S. 361, 366; 3 Comp. Dec. 282.

damages for each calendar day of delay "until the work is completed or accepted." That language was intended undoubtedly to delineate merely the ultimate date of the contractor's liability. It certainly was not designed to throw an obstacle in the way of the Government's unquestioned contract right to put an end to the contractor's right to proceed when it becomes apparent that delivery of the building will be unreasonably delayed. That phrase should therefore be deemed to be not definitive but merely an explanation of what may be the full measure of the contractor's liability for liquidated damages, a lesser amount being recoverable where the Government cannot appropriately tolerate further delay in the completion of the building.[8] Such a construction conforms to the accepted view of similar stipulations, under which the courts hold that the right to liquidated damages accrues from day to day as the delay in completion continues (*Louisville & N. R. Co.* v. *Mason & Hoge Co.*, 126 Ky. 844, 853), and that since the agreed completion date fixes the time as of which liquidated damages begin to accrue, damages run forward from that date. *Southern Pa-*

[8] The United States in this case does not seek recovery of liquidated damages beyond the date upon which the contractor's right to proceed with the work was terminated. Consequently, there is no need to consider the Government's right, if any, to liquidated damages beyond such date.

*cific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288, 291 (C. C. A. 2); *Texas & St. L. Ry. Co.* v. *Rust*, 19 Fed. 239, 245 (C. C. E. D. Ark.); *Consolidated Cut Stone Co.* v. *Seidenbach*, 181 Okla. 578, 588.

Moreover, the consistent administrative application of Article 9—a standard provision in almost every Government construction contract[9]—accords with this view. The interpretation uniformly followed in final settlements with contractors by the General Accounting Office is that the claim for liquidated damages is not forfeited by a subsequent termination of the right to proceed. That office always withholds, or takes appropriate action to collect, all accrued liquidated damages not already deducted from the balance otherwise due to the contractor. See 8 Comp. Gen. 266; 10 Comp. Gen. 433; 11 Comp. Gen. 81; 15 Comp. Gen 913. Where, as not infrequently occurs, liquidated damages have been deducted as they accrue from the progress payments to the contractor, the effect of the construction adopted by the court below will be to require the Government to pay these amounts back whenever the contractor delays long enough to compel the termination of his contract.[10]

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[9] See footnote 20, *infra*, pp. 29–30.

[10] This problem is presented in several cases now pending. E. g.: *Modern Industrial Bank* v. *United States*, Court of Claims No. 45602 (awaiting decision).

The meaning assigned to Article 9 by the Circuit Court of Appeals, that liquidated damages are available only where the Government allows the delinquent contractor to continue to delayed completion, is open to several objections. Foremost is that it requires proof of "actual damages for the delay" where termination takes place before completion, in the teeth of Section 21 of the 1902 Act, which expressly dispenses with such proof in suits on a construction contract containing a stipulation "for liquidated damages for delay." This either attributes to the draftsmen of Article 9 (the Treasury Department, 41 C. F. R. § 11.1) an intention to disobey the explicit direction of Congress by leaving the Government unprotected in a large number of cases, because of the difficulty of proof of actual damages, or penalizes the Government for unintentional ambiguities in language which, however inartistically drafted, properly read, effectuates the Congressional objectives. Termination of a contractor's right to proceed after the stipulated completion date has passed is a frequent occurrence in cases of default, particularly since an earlier termination would often depend upon an appraisal, speculative in character, that a reasonably prompt completion was not likely. Since a situation so likely to occur could not well be a *casus omissus*,[11] a construction

[11] The court below attached some weight to the fact that the liquidated damage provision would not be operative in

whereby the liquidated damage clause would be dispositive of so readily foreseeable an eventuality should be preferred over one that has it largely fail of its objective.

The view adopted by the Circuit Court of Appeals has the additional vice of leaving it entirely to the contractor whether liquidated damages will ever be paid, although under the contract the choice as to whether the contractor should be allowed to proceed past the agreed completion date, the factor which brings the liquidated damage provision into play, rests with the Government. A contractor, of course, will not have to pay liquidated damages where the Government terminates his right to proceed prior to the stipulated completion date. And, in the only circumstance in which he might be called upon to pay such damages—where the Government has let him

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all cases of inexcusable delays by the contractor, such as where the Government terminates his right to proceed before the completion date is reached (R. 96). But there is a rational basis for not stipulating for liquidated damages in such a situation, while reserving liquidated damages where termination occurs after the completion date. In the former situation, the extent to which the contractor's delays prior to termination caused delay in completion is always conjectural and involves controversial issues of fact including such matters as the diligence with which a new contractor finishes the work (cf. *School Dist.* v. *DeLano*, 96 Kan. 499; *Village of Canton* v. *Globe Indemnity Co.*, 201 App. Div. 820); in the latter case, the extent of the delay attributable to the contractor is readily demonstrable up to the time of termination.

continue beyond the agreed date—he can relieve himself of liability for accrued liquidated damages at any time short of completion simply by abandoning the work, or provoking the Government into a termination of his right to proceed.[12] He would be able to follow that course when it seemed to his advantage, i. e., whenever he concluded that the accrued liquidated damage would be greater than those damages which are permitted under the decision of the Circuit Court of Appeals, the excess cost of completion plus provable damage from his delay. (See Madden, J., dissenting in *Maryland Casualty Co.* v. *United States,* 93 C. Cls. 247, 257–258).

Additionally, if the view of the Circuit Court of Appeals were accepted, Government contracting

[12] As Judge Madden stated in his dissenting opinion in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 258:

"So long, however, as the work is left in the hands of the contractor, the delay in completion is his sole responsibility, and there is no reason why he should escape the agreed remedy for it by the easy expedient of prolonging it to a time when the Government, needing the facilities contracted for must take over and complete the work. If this becomes the established doctrine, the practice of the Government, often advantageous to both parties, of refraining from taking over the work even though it seems certain that it will not be completed on time, in the hope that the contractor, spurred by the liquidated-damages clause, will bend every effort toward a completion as soon as possible after the time, will no longer be prudent, since the contractor can often serve his interests better by doing nothing and thus compelling the Government to take over the work and forfeit the liquidated damages already accrued than by proceeding diligently."

officers would be induced to allow a contractor to proceed to completion despite inexcusable delays so as not to forfeit the mounting liquidated damages, whereas the public desideratum is, assuredly, prompt completion and occupancy of needed structures. An interpretation conducive to such results defeats the purposes of the clause: the contractor may elect the damages he shall pay in a situation where he should not have the right of choice; the Government is put to the burden of proving the actual damages if it is to recover from the contractor for the delay in completing a public building, a difficult and often insuperable burden of which the 1902 Act declared it should be relieved; and the liquidated damages provision, instead of being a stimulant of performance (cf. *Robinson* v. *United States*, 261 U. S. 486, 488), has the opposite tendency in just those instances when the delay has been most protracted and vexatious. Madden, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 257–258; 52 Harv. L. Rev. 160, 161; 35 Ill. L. Rev. 74, 76. In the interpretation of a provision so cloudy in meaning as Article 9 that construction should be adopted which favors the public interest. Restatement of Contracts, Sec. 236 (f).

The interpretation of Article 9 for which the Government contends is fair both to the Government and to the contractor. If the contractor is permitted to proceed after the agreed completion

date, in the expectation that he can finish his job with reasonable promptness, he is given the opportunity to see that the cost of performance to the Government is not increased, thus minimizing any actual damages he might be called upon to pay, as well as avoiding that impairment of his reputation as a contractor which may flow from the denial of such an opportunity. For the Government's forbearance, it is only appropriate that he should pay the agreed damage for the public's inconvenience, so long as it is expedient to extend forbearance. Of course the amount of liquidated damages for which the contractor may be held ultimately responsible is always within his control, since by appropriate diligence in completing the project he can avoid or lessen the total damages payable. Moreover, all contractors are treated alike under the Government's construction, whereas the interpretation of the Circuit Court of Appeals gives a preference to the contractor who, it turns out, should not have been given the opportunity to make good his default.

It has been suggested [12] that Article 9 provides alternative and mutually exclusive contractual remedies—liquidated damages if the contractor is

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[12] This was the construction given Article 9 by *United States* v. *Cunningham*, 125 F. (2d) 28 (App. D. C.), and by a majority of the Court of Claims in *Maryland Casualty Co.*

allowed to continue to completion and excess cost if he is not. But these remedies should not be so treated, since they have regard to different and unrelated items of damage arising at different times, and since resort to either alone would leave uncompensated injuries. See Madden, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 258; *Bacigalupi* v. *Phoenix Bldg. Co.*, 14 Cal. App. 632, 637–638; 18 Comp. Dec. 599.

Excess costs have no necessary relation to delayed completion,[14] and may be recovered under

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v. *United States*, 93 C. Cls. 247. There are no other decisions directly in point. Other Court of Claims decisions cited by the Circuit Court of Appeals in its opinion in this case (R. 97) did not involve situations in which the contractor's right to proceed was terminated after the stipulated completion date. In *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284 (C. C. A. 5), affirming 29 F. Supp. 598 (E. D. La.), certiorari denied, 311 U. S. 696, the Circuit Court of Appeals affirmed a judgment allowing liquidated damages and excess costs in completing a contract terminated by the Government after the completion date. However, the precise questions here involved were not presented to the court.

[14] Liability for excess cost is included in the standard form contracts to enable the Government to recover amounts expended in good faith to complete the contract and thus eliminate reasonableness of the outlays as a possible issue. *Baer* v. *Sleicher*, 153 Fed. 129 (C. C. A. 6); *Massachusetts Bonding & Ins. Co.* v. *John R. Thompson Co.*, 88 F. (2d) 825 (C. C. A. 8), certiorari denied, 301 U. S. 707. In the absence of a special provision the excess cost could not be recovered at all if the contractor were dispossessed before the completion date. *Stone & Gravel Co.* v. *United States*, 234 U. S. 270, 277–280; *United States* v. *O'Brien*, 220 U. S. 321, 327.

Article 9 even where the work is completed by a successor by the stipulated date, as recognized by the Circuit Court of Appeals (R. 97–98). To recover the additional costs of completion still leaves the Government uncompensated for deprivation of the use of its building. The separability of these items of damage has been recognized by other courts in construing provisions similar to Article 9 in contracts between private parties, and the more recent trend has been to allow both excess cost and liquidated damages for delay, particularly when the contractor abandons after the time set for completion has passed.[18]

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[18] *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2); *Six Companies* v. *Joint Highway Dist. No. 13*, 110 F. (2d) 620 (C. C. A. 9); *Bankers Surety Co.* v. *Elkhorn River Drainage District*, 214 Fed. 342, 347 (C. C. A. 8); *City of Reading* v. *United States Fidelity & Guaranty Co.*, 19 F. Supp. 350 (E. D. Pa.); *General Supply & Const. Co.* v. *Goelet*, 241 N. Y. 28 (1925); *Comey* v. *United Surety Co.*, 160 App. Div. 698 (1914), affirmed, 217 N. Y. 268; *McKegney* v. *Illinois Surety Co.*, 180 App. Div. 507 (1917); *Clemente Construction Corp.* v. *Cox Contr. Co.*, 172 N. Y. Misc. 904 (1939); *School District* v. *DeLano*, 96 Kan. 499 (1915); *National Loan and Exchange Bank* v. *Gustafson*, 157 S. C. 221, 230 (1930). There is some diversity in the state cases on the right to liquidated damages in case of abandonment, but "the better opinion" supported by substantially all of the more recent cases (cited *supra*) allows recovery. McCormick, *Damages* (1935), p. 619; *Applicability of Liquidated Damages Clause to Delays Where Building Contractor Abandons*, 35 Ill. Law Rev. 74 (1940). There is a statement to the contrary in 3 Williston, *Contracts* (Rev. Ed.), p. 2210, but no supporting reasons are advanced,

The decision below makes the Government's termination of the contractor's right to proceed, however justified, a reason for forfeiting the accrued liquidated damages. But such termination has no relevance to the damages caused by delay; for, as was said in *General Supply & Const. Co.* v. *Goelet*, 241 N. Y. 28, 36-38, in allowing liquidated damages for delay even where the owner unlawfully terminated the contract:

> When the contractor was put off the work, the owner had suffered damage by the failure of the contractor to complete eight months before, during which time the owner

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and the statement has been frequently criticized and the few authorities cited distinguished. See *Southern Pacific Co.* v. *Globe Indemnity Co.*, *Six Companies* v. *Joint Highway Dist. No. 13* and *Clemente Construction Corp.* v. *Cox Contr. Co.*, 35 Ill. Law Rev. 74, and McCormick, all cited *supra*, and 32 Harv. Law Rev. 160, 161. In the *Southern Pacific* case, after referring to Williston, the Second Circuit declared (21 F. (2d), at 291):

"A close examination of the cases, however, does not in our opinion establish such a rule, and we can see no justification for it, at least when the contractor abandons after the time for completion has passed. In such a case some part of the liquidated damages has accrued before the repudiation. No intelligible reason has been suggested why the owner should lose his right to them because of subsequent repudiation."

The *Clemente* opinion reviews the leading authorities and concludes, 172 N. Y. Misc., at 910 (quoting from 32 Harv. Law. Rev. 161): "The older view, then, is anomalous in that the more flagrant the breach and the greater the likelihood of delay, the more difficult it will be for the owner to recover for the delay he was guarding against."

> lost the use of the building. Nothing the contractor was prevented from doing or could possibly do would wipe out the damage.

There is "no intelligible reason" why the Government should lose its right to accrued liquidated damages merely because the contractor's default is sufficiently flagrant to justify if not require termination.[16] *Southern Pacific Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288, 291 (C. C. A. 2); see also Whitaker, J., dissenting in *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247, 256–257. Such forfeiture is not explicable on the ground that the Government has an election whether or not to terminate, as the court below fallaciously assumes (R. 96); for termination will be required wherever the contractor refuses to proceed, as Article 9 recognizes, and where progress may be so disappointing that no practical course of action other than termination is available to the Government.[17]

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[16] The Government did not terminate the contract. It merely terminated the contractor's right to proceed. *United States* v. *Continental Casualty Co.*, 29 F. Supp. 598, 602 (E. D. La.), affirmed, 113 F. (2d) 284 (C. C. A. 5), certiorari denied, 311 U. S. 696. Compare Walker-Smith and Close, *The Standard Form of Building Contract* (1939), p. 80. No reason why termination of the right to proceed should prejudice accrued liquidated damages is discerned.

[17] The record is silent as to the reason for the termination in the case at bar. Its justification was not denied below.

That the construction for which we contend requires some implications from the express language of Article 9 was a formidable objection to the Circuit Court of Appeals.[18] But Article 9 was included, as already stated, in compliance with a statute which evinces the congressional concern that liquidated damages for delay be stipulated in construction contracts, and the statute would consequently fill any interstices in the liquidated damages clause in the present contract, if they were not already filled by paragraph 5 of the specifications. *United States* v. *Ellicott*, 223 U. S. 524. Since Article 9 was designed to fulfill the obligation imposed by Section 21, and since there is no doubt of Congress' objective,[19] the contract should be construed as an adequate realization of the statutory policy.[20] *Personal Industrial Bank-*

[18] "Inability of the Government to make the necessary proof [of actual damages for delay] affords no justification for stretching the agreement to fit the Government's necessities" (R. 96).

[19] There is no need for the court which sees what the draftsmen of Article 9 were "driving at" to conclude here that they "have not said it." Cf. Mr. Justice Holmes in *Johnson* v. *United States*, 163 Fed. 30, 32 (C. C. A. 1); *Burstein* v. *U. S. Lines Co.*, 134 F. (2d) 89, 93 (C. C. A. 2).

[20] The same article appears in all Government construction contracts unless a deviation is authorized. 41 C. F. R. § 11.3; 9 Comp. Gen. 406. The Procurement Division of the Treasury Department evidently regarded Article 9 as it stands as satisfying the requirements of the Act of June 6,

*ers, Inc.* v. *Citizens Budget Co.*, 80 F. (2d) 327, 328 (C. C. A. 6), certiorari denied, 298 U. S. 674; *United States* v. *Lewin*, 29 F. Supp. 512, 514 (N. D. Cal.). To deny the Government liquidated damages in the present circumstances would leave the United States with no other safe remedy at the stipulated completion date "than the abrogation of the contract and the reletting of the same," contrary to the purpose of Section 21 of the 1902 Act. H. Rep. No. 1794, 57th Cong., 1st sess., p. 8. There should be no objection to giving the word "if" in Article 9, its possible meaning of "so long as," for "where the whole context * * * demonstrates a particular intent * * * to effect a certain object, some degree of implication may be called in to aid that intent." *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, quoting from *Durousseau* v. *United States*, 6 Cranch 307.

## CONCLUSION

It is respectfully submitted that the decision below, in so far as it denies liquidated damages against respondent for the contractor's delay in the performance of the contract until termination of his right to proceed, is erroneous and

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1902, and therefore considered reference to the Act unnecessary. That being the case, Section 21 is a reliable guide to the interpretation of the liquidated damages clause, regardless of the executive department that controls the contract.

should be reversed, with the result that the judgment of the district court should be affirmed in its entirety.

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FEBRUARY 1944.

## APPENDIX

Section 21 of the Act of June 6, 1902, c. 1036, 32 Stat. 310, 326 (40 U. S. C. § 269), provides:

> In all contracts entered into with the United States * * * for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Article 9 of the standard form of Government construction contract provides in part (R. 15–16):

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate

his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *.

Paragraph 5 of the specifications of the contract here involved, expressly made a part thereof, provides (R. 8):

> Liquidated Damages.—The contractor shall pay to the government the amount of Twenty-Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract.

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